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No. 08-116

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COURTNEY MANBECK, *et al.*,

Petitioners,

v.

KATONAH-LEWISBORO SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's decision to dismiss petitioners' Amended Complaint, with prejudice, pursuant to Rule 12(b)(6) on the grounds that petitioners failed to state a claim for which relief can be granted against the respondents under the Fifth and the Fourteenth Amendments, as well as 42 U.S.C. §§ 1981, 1983 and 1985?

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PROCEDURAL HISTORY

Petitioners filed a class action suit in the United States District Court for the Southern District of New York on behalf of all similarly situated December born children in New York that were denied kindergarten admission in school districts that applied a December 1 cut-off date. The suit alleges that New York Education Law § 3202 violated petitioners' rights to Due Process and Equal Protection under the Fourteenth Amendment. Petitioners' Amended Complaint also alleged violations under 42 U.S.C. §§ 1981, 1983 and 1985. In addition, petitioners also sought to command public school officials to provide transportation to those children born after the December 1 cut-off date who attend private school. Respondents moved to dismiss this case pursuant to Rule 12(b)(6) on the grounds that petitioner was not denied a property interest either in public school enrollment or in transportation to a private school. Furthermore, respondents argued that petitioner was not denied equal protection of the law and her substantive due process rights were not violated because the relevant statutes, regulations and policies are rational. The District Court granted the respondents' motion and dismissed the action in its entirety, with prejudice, on the grounds that petitioner did not have a legitimate property interest, as asserted in her moving papers, to attend kindergarten because she did not reach the required age of attendance on or before December 1. The court held that without such a property interest, petitioner had not been denied due process. Furthermore, petitioner was not denied equal protection of the law in that a rational basis exists for excluding

children born after the December 1 cut-off date because admitting these children would put a burden on the progress of other students in the class, as well as increase transportation costs for the District. Finally, the court held that petitioner failed to demonstrate that she was deprived of a right secured by the Constitution and that a conspiracy to deny her right to attend kindergarten at a public school existed. In a Summary Order, the Court of Appeals for the Second Circuit affirmed the District Court's decision holding that property interests protected by procedural due process are not created by the United States Constitution and the courts will defer to the State statutes and regulations to determine if there is a benefit. Therefore, public education is not a fundamental right. Furthermore, the lower court held that the statutes and regulations set forth by the State of New York were rational.

STATEMENT OF FACTS

In March, 2005, petitioner Courtney Manbeck (hereinafter "Petitioner") sought admission to kindergarten at Increase Miller Elementary School, a public school located within the Katonah-Lewisboro School District (hereinafter "District"), wherein petitioner resides with her parents.

Petitioner was born on December 11, 2000. Pursuant to New York Education Law § 3202 ("Section 3202"), a person over the age of five and under the age of twenty-one who does not possess a high school diploma is entitled to attend public school in the school district in which they reside free of charge. Furthermore, to be eligible to attend, the child must reach five years of age

by December 1 of the year in which they seek admission into public school. Since petitioner was born ten days after the statutory cut-off date, she was not eligible for kindergarten enrollment in the year 2000 and was denied admission. In May, 2005, petitioner's parents enrolled her at the Melrose School, a private educational institution, also located within the Katonah-Lewisboro School District.

Petitioner's parents also enrolled petitioner's school-aged sister, Lara, at the Melrose School in May, 2005. Thereafter, petitioner's parents requested bus transportation for Courtney and Lara Manbeck. Pursuant to New York Education Law § 3635 ("Section 3635"), transportation is provided for all children attending grades kindergarten through eight who live more than two miles from the school in which they legally attend. The District agreed to transport Lara to the Melrose School, however, they denied transportation to petitioner based on the fact that under Section 3202, she was not legally attending kindergarten.

REASONS FOR DENYING THE PETITION

The Court of Appeals correctly affirmed the District Court's decision. Petitioners repeatedly misrepresent the reasons the District Court dismissed petitioners' Complaint. Throughout their current petition, petitioners base their argument on the premise that kindergarten education is a property interest and that being denied admission, despite the fact that petitioner reached age five after the December 1 cut-off date in the district in which they reside, violated petitioner's Equal Protection and Due Process rights. As the Court

held in *Board of Regents v. Roth* , 92 S. Ct. 2701 (1972), "Property interests . . . are not created by the Constitution." Instead, the legislature defers to the individual states to create their own laws. Therefore, to determine whether a property interest exists, the courts will defer to the individual states. Pursuant to the New York State Constitution, Article XI, § 1, "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Section 3202 further defines who may or may not be admitted to kindergarten in the State of New York: "[n]othing herein contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December." Moreover, kindergarten education is not mandatory in the State of New York and children under the age of six are not required to attend full time instruction.[1]

Furthermore, petitioners fail to establish that they have a right to district funded transportation. The State statutes provide that any child legally attending kindergarten is eligible for free transportation to their respective school if they are the age in which the district allows a child to legally attend kindergarten. Since the petitioners fell below that legal age if they were born on or after December 1 of the year 2000, they were not eligible for district funded transportation even if they were attending private kindergarten.

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1. Pursuant to New York Education Law § 3205(1)(a): "In each school district of the state, each minor from six to sixteen years of age shall attend upon full time instruction."

In addition, petitioners argue that there is no rational basis for the cut-off date, however, quite the opposite is true. The state set the cut-off date for the benefit of all children in attendance. Younger children may not perform at the level of older children, thus stunting the educational growth of an entire class for the benefit of possibly one student who had not reached five by the December 1 cut-off date. As petitioners state in their petition, there were approximately twenty-five students in the Katonah-Lewisboro School District born after the December 1 cut-off date that may or may not have sought entrance into kindergarten. To provide for transportation and additional school costs for petitioners' to enter kindergarten and receive District funded bus transportation, the District would be forced to reconfigure their budget to fund the added burden of these new students.

Finally, with the exception of a brief footnote in their Appellate Brief [2], petitioners raise for the first time here

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2. Petitioners Appellate Brief Footnote 3: "As a matter of first impression, it seems that "developmental" problems are the main factor to justify discrimination, the districts of the inner cities of Yonkers and New York, both of which are afflicted with numerous social ills of urban life, should lay claim to such problems. The fact that both Yonkers and New York City have adopted the December 31 cutoff date undermines defendants' claim since the all-white suburban children of the Katonah-Lewisboro District could not possibly experience more "developmental" issues than Yonkers' or New York City's children. A more apt comparison between the Districts of Somers and Katonah-Lewisboro, which both have a similar number of kindergarteners (265 in Somers and 285 in Katonah-Lewisboro) and population characteristics equally provides no (Cont'd)

that the application of the statutes in question results in racial discrimination.

I. ISSUES NOT ADDRESSED BY THE LOWER COURTS SHOULD NOT BE ADDRESSED BY THIS COURT FOR THE FIRST TIME ON APPEAL

As discussed *supra*, petitioners raise for the first time in their petition the alleged race-based discrimination created by the law prohibiting admission of children born after December 1 of the year they reach the age of five. This Court has consistently declined to weigh issues not raised or considered by the lower courts. In *Duignan v. United States*, 274 U.S. 195 (1927), the Court refused to hear a challenge to the equity jurisdiction of the Court raised for the first time before the Court. The Court noted, "[t]his Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Id.* at 200. Similarly, in *Neely v. Martin K. Eby Construction Co., Inc.*, 368 U.S. 1027 (1967), petitioner raised an issue not addressed by the Court of Appeals or raised in her petition for a writ of certiorari. The Court stated, "we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals . . ." *Id* at 1081. *See also Cooper Industries,*

(Cont'd)

factual support for the School District's "developmental" claim as the Somers Central School District has been admitting all December-born children in its kindergarten classes without any reported problems.

Inc. v. Avial Services, Inc., 543 U.S. 157 (2004) and *Exxon Shipping Company, et al. v. Baker*, 128 S.Ct. 2605 (2008). Although the Court has previously examined issues not raised below, such questions must present unusual circumstances and be of vital importance. *See Taylor v. Freeland & Kronz et al.*, 503 U.S 638 (1992) Citing *Berkemer v. McCarty*, 468 U.S. 420 (1984). The new questions raised by petitioners do not present unusual circumstances, since school districts across the country have their own age cut-offs. In addition, the questions raised by petitioners are not of vital importance in that none of their fundamental rights were violated. The petition for a writ should, therefore, be denied.

II. THE LOWER COURT CORRECTLY DISMISSED PETITIONERS' FOURTEENTH AMENDMENT DUE PROCESS CLAIMS

Petitioners failed to show that they have been deprived of any property interest by being prohibited from enrolling in public school or being denied district funded transportation to a private school. Furthermore, petitioners' Due Process and Equal Protection claims were correctly dismissed because the relevant statutes, regulations, and policies creating age-based criteria for enrollment in public schools and transportation by the district to private schools are reasonable, not arbitrary, and satisfy the rational basis test.

A. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' PROCEDURAL DUE PROCESS CLAIMS BECAUSE CHILDREN BORN AFTER DECEMBER 1 OF THE YEAR THEY REACH THE AGE OF FIVE DO NOT HAVE A PROPERTY INTEREST IN ATTENDING PUBLIC SCHOOL OR IN TRANSPORTATION FUNDED BY THE SCHOOL DISTRICT

The Fourteenth Amendment provides protection of property interests once a person has gained such an interest. "[P]roperty interests . . . may take many forms." *Board of Regents v. Roth*, 92 S.Ct. 2701, 2708 (1972). Furthermore, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim to it." *Id.* at 2709. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

> "Although the underlying substantive interest created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

> Resolution of the federal issues begins, however, with a determination of what it is that the state law provides."

Town of Castlerock, Colorado v. Gonzalez, 125 S. Ct. 2796, 2803-4 (citations omitted).

The property interest to a free public school education is created by Article XI, § 1 of the New York State Constitution, which provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." It is further defined in Section 3202. According to Section 3202,

> "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition . . . Nothing herein contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December."

Petitioner was born on December 11, 2000, eleven days past the December 1 deadline for admission to kindergarten in the Katonah-Lewisboro School District. Pursuant to Section 3202, she was not old enough to attend kindergarten for the 2005/2006 school year. Because she was not old enough to attend kindergarten under New York State law, petitioner did not have a property interest in attending public school in the

Katonah-Lewisboro School District. Since the petitioner had no property interest to attend kindergarten during the 2005/2006 school year, there was no due process violation on respondents' part.

This case is distinguishable from *Goss v. Lopez*, 95 S.Ct. 729 (1975), cited by petitioners. In *Goss*, a pivotal issue in determining whether a property interest existed was whether school attendance was required. As discussed *supra*, pursuant to Section 3205, children are not required to attend full day instruction in school until they are six years of age, thus making kindergarten optional in New York.[3] In the instant case, petitioner had not reached the age where she was required to attend school. Therefore, petitioner did not have a property interest in attending kindergarten during the 2005/2006 school year. Similarly, petitioner did not have a property interest in District funded transportation. According to Section 3635, all children residing in the district in which they legally attend public or private school are entitled to bus transportation, free of charge. Although Section 3202 does not specify age limits for those students attending private school, the New York State legislature, under Article 8 of the New York Compilation of Codes, Rules and Regulations § 125.9 ("NYCRR Section 125.9"), has determined that "A kindergarten shall not admit a child who is younger than the age of entrance into the public schools established by the school district in which that child

3. Forty-four states require kindergarten attendance. States that do not require kindergarten attendance include NewYork; Alaska; Idaho; New Hampshire; North Dakota; and Pennsylvania. *See http://nces.ed.gov/programs/statereform/res_tab10.* asp

resides." The Katonah-Lewisboro School District has adopted the same minimum age requirements set forth in Section 3202. Thus, it follows that children not eligible to legally attend kindergarten are not entitled to free bus transportation from the District in order to attend private school.

The New York State Commissioner of Education has previously denied district funded transportation to a child attending a private school. *Smith v. Amherst*, Decision 13,934 (May 6, 1998). In his decision, the Commissioner states that, "[a]lthough there may be a bus available, [the School District] lacks authority to transport students who are ineligible for transportation, notwithstanding the fact that there may be room on the bus for them." *Id.* Similarly in deciding the same issue in *Knauff v. Board of Education*, 293 N.Y.S.2d 133, (N.Y. Sup., 1968) the court stated that "[w]e find no statute, however, which imposes upon school boards the duty to provide free transportation for any child under five years of age."

In *Appeal of a Preschool Child With A Disability*, Decision No. 15,012 (January 16, 2004), the constitutionality of denying free bus transportation to a disabled child was at issue. The Commissioner described the statutory scheme as follows:

> A board of education's authority to provide transportation is restricted to the limitations set forth in Education Law § 3635. Section 3635(1)(e) authorizes, but does not require, a board of education at its discretion, to provide transportation under specified

> circumstances to any child attending grades kindergarten through eight between the school such child legally attends and the childcare locations, including daycare centers. However, **the statute does not provide a board of education with authority, even discretionary, to provide transportation to a child of less than school age, except in the limited circumstances where such child is accompanying a parent who is under 21 years of age to and from such parent's school** (see Education Law § 3635(1)(f)).

Appeal of a Preschool Child With a Disability, Decision No. 15, 012 (citations omitted) (emphasis added). *Accord Appeal of Wheelwright*, Decision 14, 744 (June 19, 2002).

The New York State Constitution provides the right to a free public education and New York statutory law mandates that a child between six to sixteen years of age attend full-time instruction pursuant to Section 3205. In addition, the State confines the property interest of free education to those students who reach the age of five before December 1 of the year in which they seek admission. The concurrent right to transportation is similarly limited by age. At the time petitioner sought admittance, petitioner had not reached the age to legally attend school in the District, therefore, she had no property interest in attending public school or receiving District funded transportation. Without such property interest, petitioners due process rights were not violated and her claims were properly dismissed. The current petition for a writ of certiorari should, therefore, de denied.

B. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIMS

Upon review of Sections 3202 and 3635, as well as NYCRR Section 125.9, petitioners fail to show that any fundamental right is at stake. Therefore, the statutes and regulations in question are subject to minimal scrutiny utilizing the rational basis test. Where no fundamental rights are involved, a government action will be upheld if it is rationally related to a legitimate government purpose. Education is not a fundamental right secured by the United States Constitution. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Thus, the State of New York's Constitution, statutes and policies, as they pertain to education, do not trigger property rights and are subject to mere rational basis review.

Even assuming a right to education was granted by the United States Constitution, it does not follow that it is a fundamental right. As noted *supra*, Article XI, § 1 of the New York State Constitution states, the legislature, "shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Although the legislature grants the right to free education to children who reside in the state, "children" is not defined. Section 3202 provides a bright line rule where the State Constitution is silent and defines "children" as those over five years of age on or before December 1 of the year they seek admission to kindergarten. Without such guidelines, any child, regardless of their age, could be admitted to school.

C. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' EQUAL PROTECTION CLAIMS BECAUSE THE AGE DISTINCTIONS CREATED IN THE STATUTES AND REGULATIONS ARE RATIONAL

To raise and succeed on an Equal Protection claim, petitioners must establish that they have been "intentionally treated differently than those similarly situated." *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). State Legislatures are granted "substantial latitude to establish the classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and account for limitations on the practical ability of the State to remedy every ill." *Plyer v. Doe*, 457 U.S. 202 (1982). The rational basis test is applied where non-suspect classes are at issue. Age is not a suspect class. As set forth in *Jaffee v. Society of New York Hospital*, 1999 WL 24747 (S.D.N.Y. 1999):

> [C]ourts have applied rational basis scrutiny to classifications based on youth or infancy. *See Douglas v. Hugh A. Stallings, M.D., Inc.* 870 F.2d 1242, 1246 (7th Cir. 1989)(holding that "statutes which classify on the basis of age are subject only to the minimal rational relationship review"); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) (finding that "[n]o cases have ever held, and we decline to hold, that while the Equal Protections Clause ensures that all persons

> similarly circumstanced shall be treated alike, it does not require classes of people different in fact or opinion to be treated in law as though they were alike. *Plyer v. Doe*, 457 U.S. 202, 217, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

Therefore, if there is a conceivable rational basis for a classification, a government action will be upheld. *See e.g. Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that a State constitution that required judges to retire at age 70 does not violate the Equal Protection Clause). Further, "a statute is presumed constitutional, and '[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

In *Plyer v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, the Court explained (1982) (emphasis added):

> The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike. But so too, **the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.** The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications **that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and**

> **private, and that account for limitations on the practical ability of the State to remedy every ill.** In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Petitioner was four years old and born after December 1 of the year she sought admission to the District's kindergarten. Petitioner is a member of a class that the legislature of the State of New York excluded from public education until the following school year in which she would be five years old. Because she was excluded from legally attending kindergarten, she was also excluded from receiving District funded transportation.

Undoubtedly the New York State legislature has established bright line rules to circumvent issues arising from sending young children to school too early to learn and perform at the level of other students. The legislature has further established this class to accommodate public and private concerns over having to determine on a case by case basis whether a child has reached a developmental stage appropriate for entry into kindergarten. The legislature has further established this class to account for limitations on the State to undertake such a case-by-case review of every child wishing to enter public school regardless of age.

In determining whether the State's establishment of a minimum age requirement for attending public schools is legitimate, the Court need only be assured

that the classification bears some fair relationship to a legitimate public purpose. *See Plyer, supra.* Respondents are not aware of any decision in which a minimum age requirement has been found to violate the Equal Protection Clause.

Petitioners attempt to rebut the presumed constitutionality of the statutory and regulatory scheme fails. First, petitioners argue that the difference in age cut-off requirements among districts is irrational. Not only does petitioners' argument force the conclusion that different requirements equals discriminatory action, it also assumes that there can be no logical reason for the age cut-off. Second, petitioners' argument that the District's financial considerations are meritless because there are only approximately twenty-five additional students in the District seeking bus transportation not only weakens petitioners argument, it strengthens that of the District. If districts that enforce the December 1 cut-off date were required to admit an additional twenty-five students per district that did not previously meet the age requirement, each district's budget would be significantly strained in procuring additional funds for bus service and other materials. Such an action would likely result in budget cuts in other essential areas critical for ensuring the educational success of students already legally attending kindergarten and higher grade levels.

III. THE STATUTES AS THEY STAND DO NOT CREATE RACIAL DIVISION AMONG KINDERGARTEN-AGED STUDENTS

The State legislature has broad discretion to draft and implement statutes and regulations that account for imbalances that may result. The State has given the individual school districts the authority to draft their own rules and procedures for admitting kindergarten students into public school. Although kindergarten is optional in New York, statutes have been enacted detailing those who qualify for admission.

Section 3202 does not invoke a racial classification; rather, it sets an age limitation for admission to kindergarten for all students residing in the State of New York. In New York, students are admitted to public school in the district in which they reside. Districts are established by city or county. There is no evidence that the State drew up districts with the intent to exclude non-minority students from attending kindergarten.

Petitioners' attempt to analogize their case with *Parents Involved in Community Schools v. Seattle School District No.1*, 127 S. Ct. 2738 (2007). The case at bar is vastly different. Unlike the circumstances in *Parents Involved in Community Schools*, where students were assigned to a particular school within the district based on the racial composition of the school, petitioners would not be able to legally attend any school in the Katonah-Lewisboro School District, whether any of the District's schools were predominately minority or non-minority, because they would not have reached the age of five by the December 1 cut-off date.

Furthermore, all students who do reach the age of five before the December 1 cut-off date are admitted to the school within the district closest to their home, without limitation.

In addition, if the State failed to mandate that children be required to attend school in the school district in which they reside, each student would be able to attend public school wherever they like, resulting in chaos in planning bus schedules as well as teaching schedules for those who were legally attending school.

IV. KINDERGARTEN EDUCATION IN NEW YORK IS OPTIONAL, THEREFORE, DENIAL OF ADMISSION DOES NOT RESULT IN A DELAY IN EDUCATION AND DUE PROCESS RIGHTS ARE NOT TRIGGERED

As discussed above, pursuant to Section 3205, children in the State of New York are not required to attend full time instruction until they reach the age of six. In addition, kindergarten is optional in the State of New York. Furthermore, Section 3202 limits admission of children that do not reach the age of five before December 1 of the year they seek admission. The Appellate Division of the State of New York has also addressed this issue as it pertains to petitioners' argument.

The case at bar is analogous to *Frost v. Yerazunis*, 53 A.D.2d 15 (3rd Dept., 1976), in which the plaintiff was born on December 9th of the year he sought admission to kindergarten in a district that applied a December 1 cut-off date. The plaintiff in *Frost* sought a waiver of

the law in an attempt to permit him to attend school before reaching the prescribed age. The court held that the school district was not required to consider students on a case by case basis and that delaying his admission until he was old enough to legally attend did not result in a one year suspension because kindergarten is not required in the State of New York and the plaintiff could enter first grade the following year. The court added that there was no delay in education because the plaintiff attended private kindergarten. Petitioner similarly attended private school before enrolling as a first grade student at Increase Miller Elementary School for the 2006/2007 school year. Therefore, because the petitioner was not subject to a delay in education, her due process rights were not triggered.

V. CIRCUIT SPLITS OVER DEPRIVATION OF PUBLIC TRANSPORTATION AS VIOLATING THE EQUAL PROTECTION CLAUSE HAVE NO RELEVANCE OR BEARING ON THE CASE AT BAR

In her attempt to assert a case of racial discrimination against white minority students residing in the Katonah-Lewisboro School District, petitioner misapplies benchmark cases to establish that each child attending school is entitled to district funded transportation. Petitioner cites *Brown v. Board of Education of City of Bessemer*, 790 F.2d 1153 (1972), *United States v. School District 151 of Cook County*, 404 F.2d 1125 (7th Cir. 1968), and *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986) to establish that she is entitled to bus transportation in the Katonah-

Lewisboro School District. While each case addresses the issue of bus transportation, it is in the context of school desegregation in *Brown* and *United States v. School District 151 of Cook County*, and in the context of bus transportation for handicap children in *Alamo Heights Independent School District*. Therefore, none of the cases petitioners cite are relevant or in any way related to the case herein.

Acknowledging that busing is a right integral with equal access to education for all children legally attending school, petitioners still do not make a compelling argument. As discussed *supra*, Section 3202 provides that all children are permitted to attend public school free of charge, provided that they reach the age of five by the cut-off date in the school district in which the reside and are no older than the age of twenty-one. The Katanoah-Lewisboro School District has a December 1 cut-off date. Section 3635 provides that children attending school in the Katonah-Lewisboro School District, along with every other district in the State, are entitled to district funded bus transportation provided they are legally attending kindergarten. Property interests are not created by the United State Constitution, they are created by the states. To assert a claim of depravation of the right to Due Process and succeed on that claim, an individual must first prove that they have gained a property right and that property right has been violated.

The Katonah-Lewisboro School District provides free transportation to and from school so long as a child is legally attending school. At the time petitioner enrolled in private kindergarten, she was not legally

attending school, in accordance with Section 3202, because she did not reach the age of five before the December 1 cut-off date. Furthermore, petitioner was not legally required to attend kindergarten because kindergarten is optional in the State of New York. NEW YORK EDUC. LAW § 3205(1)(a).

Petitioners argue that the denial of bus transportation to December born students in the Katonah-Lewisboro School District is race-based and, thus, discriminatory. Children legally attend school in the district in which they reside. Because children attend school in the district in which they reside, they are also provided bus service in the district in which they reside. As petitioners assert, the Katonah-Lewisboro School District population is 98% white. The ethnic and racial make-up of the District has no relevance or bearing on the statute itself or the District's decision to denying transportation to the petitioner. The law applies to all school districts in the State of New York, regardless of the racial or ethnic make-up of the district. Petitioners' argument has no merit and the petition must be denied.

CONCLUSION

Petitioners fail to establish that their Due Process rights were violated and that they were denied Equal Protection under the law. The United States Constitution does not grant a property interest in education, rather, the courts will defer to the individual states. The New York State Constitution provides that each child shall receive a free public education, however, the legislature limits the age in which a child is eligible to attend to those who reach the age of five before December 1 of the year in which they seek admission. Due to the limitations created by Section 3202, petitioner does not have a property interest in attending kindergarten because she was not five prior to December 1, 2005. In addition, petitioners have no right to avail themselves of District funded transportation provided to school age children. For the reasons set forth herein, the petition should be denied.

Respectfully submitted,

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